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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10 GAYLE CARVER,)
11 Plaintiff,) No. CV-04-3105-CI
12 v.) ORDER GRANTING PLAINTIFF'S
13 JO ANNE B. BARNHART,) MOTION FOR SUMMARY JUDGMENT
Commissioner of Social) AND REMANDING FOR AN IMMEDIATE
Security,) AWARD OF BENEFITS
14 Defendant.)
15 _____)
16)

17 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.
18 Rec. 11, 18), submitted for disposition without oral argument on May
19 16, 2005.¹ Attorney D. James Tree represents Plaintiff; Special
20 Assistant United States Attorney Richard M. Rodriguez represents
21 Defendant. The parties have consented to proceed before a
22 magistrate judge. (Ct. Rec. 6.) After reviewing the administrative
23 record and the briefs filed by the parties, the court **GRANTS**
24 Plaintiff's Motion for Summary Judgment and remands for an immediate
25 award of benefits.

26 _____
27 ¹The matter has been heard on an expedited basis because the
28 briefing was complete.

1 Plaintiff filed an application for Widow's Insurance Benefits
 2 on November 9, 2000, claiming benefits based on the account of her
 3 deceased former spouse, Michael Widmier. (Tr. at 13.) At the time
 4 of application, she was 64 or 65 years of age and had not remarried.
 5 (Tr. at 44.) The application was denied initially and upon
 6 reconsideration. Following a hearing before Administrative Law Judge
 7 Arnold Battise, benefits were awarded. On its own motion, the
 8 Appeals Council reviewed and reversed the ALJ's decision. (Tr. at
 9 7-9.) This appeal followed. Jurisdiction is appropriate pursuant
 10 to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3).

THE APPEALS COUNCIL DECISION

12 The Appeals Council reviewed the ALJ's decision, noting there
 13 was an error of law and insufficient evidence to support the
 14 findings of fact. (Tr. at 7.) The Appeals Council ruled Plaintiff
 15 was not entitled to widow's benefits as the divorced spouse of the
 16 deceased wage earner because she was not married to Mr. Widmier for
 17 at least 10 years immediately before they were divorced, citing
 18 section 216(d)(2) of the Social Security Act. The Appeals Council
 19 further found Plaintiff and Mr. Widmier were first married on
 20 October 4, 1965 and divorced on November 7, 1974. They were
 21 remarried on February 29, 1976, and divorced again on July 18, 1985.
 22 Neither marriage lasted for a total of ten consecutive years.

ISSUES

24 The question presented is whether the decision of the Appeals
 25 Council is an error of law. The facts are not in dispute.

ANALYSIS

27 Relying on the Program Operations Manual System (POMS) section
 28 RS 00202.005 and principles of equity, the ALJ concluded "[t]he
 ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING
 FOR AN IMMEDIATE AWARD OF BENEFITS - 2

1 claimant is the surviving divorced spouse of the wage earner as that
 2 term is defined in the Regulations (20 C.F.R. § 404.336(a)(2)."
 3 (Tr. at 16.) He further concluded the marriage had existed for 18
 4 of the 20 years immediately prior to the second dissolution on July
 5 18, 1985. (Tr. at 15.)

6 In *Bowen v. Owens*, 476 U.S. 340, 345 (1986), the Supreme Court
 7 stated:

8 The program is a massive one, and requires Congress to
 9 make many distinctions among classes of beneficiaries
 10 while making allocations from a finite fund. In that
 11 context, our review is deferential. "Governmental
 12 decisions to spend money to improve the general public
 13 welfare in one way and not another are 'not confided to
 14 the courts. The discretion belongs to Congress, unless the
 choice is clearly wrong, a display of arbitrary power, not
 an exercise of judgment.' " *Mathews v. De Castro*, 429 U.S.
 181, 185 (1976), quoting *Helvering v. Davis*, 301 U.S. 619,
 640, (1937). As this Court explained in *Flemming v.*
Nestor, 363 U.S. 603, 611 (1960):

15 Particularly when we deal with a withholding of
 16 a noncontractual benefit under a social welfare
 17 program such as [Social Security], we must
 18 recognize that the Due Process Clause can be
 thought to interpose a bar only if the statute
 manifests a patently arbitrary classification,
 utterly lacking in rational justification.

19 . . .
 20 We have previously noted that "[t]he entitlement of any
 21 secondary beneficiary is predicated on his or her
 22 relationship to a contributing wage earner." *Califano v.*
Jobst, 434 U.S. 47, 52 (1977). In determining who is
 23 eligible for such benefits, the scope of the program does
 24 not allow for "individualized proof on a case-by-case
 basis." *Ibid.* Congress "has elected to use simple
 criteria, such as age and marital status, to determine
 probable dependency." *Ibid.* In particular, Congress has
 used marital status as a general guide to dependency on
 the wage earner: "The idea that marriage changes
 dependency is expressed throughout the Social Security
 Act." *Id.*, at 52, n. 8.

25 When Congress first began to make divorced wives eligible
 26 for wives' benefits in 1965, it focused on that group of
 27 divorced wives whose marriages ended after many years,
 28 when they might be "too old to build up a substantial

1 social security earnings record even if [they] can find a
 2 job." H.R.Rep. No. 213, 89th Cong., 1st Sess., 107-108
 3 (1965). To that end, divorced wives were eligible for
 4 wife's benefits only if they had been married to the wage
 5 earner for 20 years and received substantial support from
 6 him. It was not until 1972 that Congress dropped the
 7 requirement of showing support from the wage earner. Even
 8 then, Congress retained the 20-year marriage requirement.
 9 Congress has made the same distinctions in its treatment
 10 of divorced widowed spouses. When they first became
 11 eligible for survivor's benefits in 1965, it was under the
 12 same basic eligibility rules that applied to divorced
 13 spouses. During the relevant time of this lawsuit,
 14 divorced spouses and divorced widowed spouses had to have
 15 been married to the wage earner for at least 10 years to
 16 receive benefits.

17 In response to the Congressional changes extending benefits to
 18 the divorced widowed spouses, states and regulations were passed.
 19 The applicable statute is found at 42 U.S.C. § 416² and regulations
 20 at 20 C.F.R. § 404.336.³ Defendant contends the use of the word

21 ²Section 416 of 42 U.S.C. provides:

22 (d) Divorced spouses; divorce
 23 ...

24 (2) The term "surviving divorced wife" means a woman
 25 divorced from an individual who has died, but only if she
 26 had been married to the individual for a period of 10
 27 years immediately before the date the divorce became
 28 effective.

29 ³20 C.F.R. § 404.336 states:

30 We will find you entitled to widow's or widower's benefits
 31 as the surviving divorced wife or the surviving divorced
 32 husband of a person who died fully insured if you meet the
 33 requirements in paragraphs (a)... of this section:

34 (a) You are the insured's surviving divorced wife or
 35 surviving divorced husband and you meet both of the
 36 conditions in paragraphs (a)(1) and (2) of this section:

37 (1) You were validly married to the insured under
 38 State law as described in § 404.345 or are deemed to have
 39 been validly married as described in §404.346

1 "immediately" is reasonably interpreted by the agency as
 2 consecutive. Additionally, decisions by agency personnel are guided
 3 by reference to the POMS, § RS 00202.005.⁴ The only dispute is the
 4 application of the ten year duration requirement to the specific
 5 facts before the court.

6 It is undisputed the marriages do not qualify under a strict
 7 reading of the POMS as the date of the divorce which interrupted the
 8 marriage was not followed by a re-marriage within the following
 9 calendar year. Rather, the first divorce occurred on November 7,
 10 1974, followed by the re-marriage on February 29, 1976. However,
 11 the ALJ interpreted this separation as comprising some 16 months;
 12 under the POMS, a couple theoretically divorced on January 1 and
 13 remarried on December 31 of the following year would have been
 14 separated for more than 23 months. Thus, but for the specific
 15 timing of Plaintiff's first dissolution and later re-marriage, e.g.
 16 had the divorce occurred on March 7, 1974, followed by re-marriage
 17 on July 29, 1975, (the same number of months of separation) there
 18 would be no question of qualification under the POMS for benefits.

19

20 (2) You were married to the insured for at least 10
 21 years immediately before your divorce became final.

22

⁴POMS section RS 00202.005 provides:

23

A divorced spouse must (1) be finally divorced from the
 24 NH; and (2) have been married to him/her for a period of
 25 at least 10 years immediately before the date the divorce
 26 became final. This requirement is met if the divorce
 27 became final on or after the tenth anniversary of the
 28 marriage. This is so even if this period was interrupted
 by a prior divorce, provided the remarriage took place no
 later than the calendar year immediately following the
 calendar year of the divorce. Even when this requirement
 was not met with respect to the claimant's last divorce,
 she/he may qualify based on a 10-year period of marriage
 immediately before a prior divorce.

1 The Social Security Act is remedial and is to be liberally
 2 construed. *Doran v. Schweiker*, 681 F.2d 605, 607 (9th Cir. 1982).
 3 Moreover, the POMS do not have the force and effect of law. *Lowry*
 4 *v. Barnhart*, 329 F.3d 1019, 1022-23 (9th Cir. 2003). The POMS
 5 example is only that and cannot trump the spirit and intent of
 6 Congress.

7 The only cases to interpret this specific issue involve
 8 marriages that were days shy of ten years. *Albertson v. Apfel*, 247
 9 F.3d 448 (2nd Cir. 2001) (benefits denied where marriage was
 10 dissolved three days shy of the tenth anniversary); *George v. Sullivan*, 909 F.2d 857 (6th Cir. 1990) (benefits denied where divorce
 11 occurred just seven days shy of ten year duration even in light of
 12 *nunc pro tunc* decree amending final divorce decree date to within
 13 the applicable time frame). However, in neither of these two cases
 14 were re-marriages at issue; in both cases, the total length of the
 15 union between the spouses was shy of ten years. That is not the
 16 case here; the total length of marital union was 18 years and
 17 included the birth and development of the couple's seven children.
 18 There are no cases cited by the parties which involve remarriage.
 19 This scenario fits well within the spirit of Congressional intent as
 20 outlined in *Owens* and within the short-term dissolution period
 21 contemplated by the POMS. Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is
 25 **GRANTED**; the matter is **REMANDED** for an immediate award of benefits.
 26 2. Defendant's Motion for Summary Judgment dismissal (**Ct. Rec.**
 27 **18**) is **DENIED**.

28 3. Any application for attorney fees shall be filed by

1 || separate Motion.

2 4. The District Court Executive is directed to file this
3 Order and provide a copy to counsel for Plaintiff and Defendant.
4 The file shall be **CLOSED** and judgment entered for Plaintiff.

5 DATED May 6, 2005.

s / CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE